

of Section 553(b) of the APA.

Even if the Commission ignores the substantive effect of its action and determines that the freeze was merely procedural, the Commission failed to issue any Public Notice which would give the industry a clear understanding of the freeze in compliance with Section 552(a)(1) of the APA. In fact, it was not until some forty-four (44) days later that the Commission finally released the Third Report and Order including the full text of the action suspending acceptance of 800 MHz applications.

Additionally, although the Commission states that the freeze is effective on August 9, 1994, the purported date of "adoption" of the Third Report and Order ("Order"), it is clear that the content of the Order, and specifically the provisions of the Order relating to the freeze, was not settled until sometime after August 9, 1994. Since the Order was not "adopted" on August 9, 1994, CCI's application, received at the FCC Lockbox at Mellon Bank in Pittsburgh on August 10, 1994, is acceptable for filing.

By this Petition, CCI requests that the Commission reconsider its action of September 6, 1994, returning CCI's Mid-south ESMR application. Because the suspension of acceptance of applications was implemented improperly, CCI requests that the Commission reinstate its application as originally filed on August 10, 1994.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)
)
CHADMOORE COMMUNICATIONS, INC.)
)
For authority to construct)
and operate an Enhanced)
Specialized Mobile Radio System)
to serve areas in Arkansas,)
Missouri and Tennessee)

To: Chief, Land Mobile Branch
Licensing Division
Private Radio Bureau

PETITION FOR RECONSIDERATION

Chadmoore Communications, Inc. ("CCI"), by counsel, and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby petitions for reconsideration of the return of its application for an Enhanced Specialized Mobile Radio ("ESMR") system utilizing various 800 MHz frequencies, to serve areas in Arkansas, Missouri and Tennessee (the "Mid-South ESMR"). In support of its petition, CCI respectfully submits.

On August 10, 1994, CCI submitted its application for the Mid-South ESMR.^{1/} On August 9, 1994, the Federal Communications

^{1/} By its application, CCI, a qualified small business entity, proposed to consolidate 800 MHz facilities licensed to various entities into a cooperative venture linking the distribution hubs of Memphis, Tennessee and Little Rock, Arkansas, and surrounding communities. The proposal was designed to use the spectrum already allocated to the disparate licensees participating in the project. It proposed a more efficient use of the spectrum through cooperation, aggregation, common management and implementation of enhanced digital transmission equipment. Implementation of this proposal would involve a change in the character of transmission via facilities already licensed to the participating licensees and the authorization of new facilities re-using those frequencies already authorized at

Commission ("FCC" or "Commission") issued a News Release announcing the suspension of acceptance of applications for new or modified 800 MHz facilities.^{2/} This News Release, however, does not appear on the Commission's Daily Digest for August 9, 1994.^{3/} It does appear on the Daily Digest for August 10, 1994.^{4/} On September 6, 1994, the Commission returned CCI's Mid-South ESMR application without action because "[i]n its adoption of the Third Report and Order in GN Docket 93-252, the Commission suspended effective August 10, 1994, the acceptance of new 800 MHz SMR applications."^{5/} On September 23, 1994, the Commission issued the full text of the Third Report and Order in GN Docket 93-252.^{6/}

The Commission's haphazard actions in this proceeding have resulted in substantive harm to CCI with respect to its application for its Mid-South ESMR. Because its practical effect on CCI is substantive and not procedural, the implementation of

other locations within the proposed service area or "footprint." See Exhibit 1.

^{2/} See Report No. DC-2638, "Regulatory Framework for CMRS Completed," attached hereto as Exhibit 2. This News Release specifically notes that "[t]he Commission further decided that in light of the changes to be implemented in 800 MHz licensing, acceptance of new 800 MHz SMR applications (including SMR applications for General Category channels) will be suspended, effective immediately, until new licensing rules are adopted. Exhibit 2, p. 3.

^{3/} See Exhibit 3.

^{4/} See Exhibit 4.

^{5/} See Exhibit 5.

^{6/} See Exhibit 6.

the freeze violates Section 553(b) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553(b). In light of its substantive effect, the freeze is subject to the notice and comment provisions of the APA. Implementation of a substantive rule without an opportunity for notice and comment is a violation of Section 553(b) of the APA.

Clearly, if, as CCI argues, the freeze is a substantive rule, the notice provisions of Section 553(d) require advance publication. Further, the rule cannot take effect until 30 days after publication. However, even if the Commission ignores the substantive effect of its action and determines that the freeze was merely procedural, the Commission was still required to publish the rule 30 days before its effective date under Sections 552(a)(1) and 553(d), unless it found good reason not to publish and published that good reason with the rule.

Additionally, although the Commission states that the freeze is effective on August 9, 1994, the purported date of "adoption" of the Third Report and Order ("Order"), it is clear that the content of the Order, and specifically the provisions of the Order relating to the freeze, was not settled until sometime after August 9, 1994. The first date on which any Public Notice of the Order was released was September 23, 1994. Therefore, the Order was not "adopted" on August 9, 1994 and, therefore, CCI's application, received at the FCC Lockbox at Mellon Bank in Pittsburgh on August 10, 1994, is acceptable for filing.

By this Petition, CCI requests that the Commission reconsider its action of September 6, 1994, returning CCI's Mid-South ESMR application. Because the suspension of acceptance of applications was implemented improperly, CCI requests that the Commission reinstate CCI's application as originally filed on August 10, 1994.

I. BACKGROUND

In August 1993, the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),^{2/} was enacted. Section 6002 of the Budget Act, Title VI § 6002(b) amended Sections 3(n) and 332^{8/} the Communications Act of 1934^{9/} to establish regulatory symmetry among similar mobile services. The Budget Act set forth a specific timetable for transition to the new regulatory structure. It established deadlines for enactment of FCC rules necessary to implement the new regulatory structure and effect an orderly transition. In response to that Congressional mandate, the Commission has issued the CMRS Report and Order,^{10/} the CMRS

^{2/} See Pub. L. No. 103-66, 107 Stat 312, (1993).

^{8/} See 47 U.S.C. §§ 3(n), 332.

^{9/} Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 ("Communications Act" or "Act").

^{10/} 8 FCC Rcd ____ (1993).

Second Report and Order,^{11/} and on September 23, 1994, it released the CMRS Third Report and Order.^{12/}

By the Third Report and Order, the Commission completed the initial implementation of Sections 3(n) and 332 of the Act^{13/} by adopting changes to the technical, operational and licensing rules for common carrier and private mobile radio services which it viewed as necessary to implement the Congressional mandate and establish regulatory symmetry among similar mobile services.

Paragraph 108 of the Third Report and Order suspended the "acceptance of 800 MHz applications on the 280 SMR category channels on the close of business August 9, 1994, the date of adoption of this Order."^{14/} Among other exceptions,^{15/} the Third Report and Order specifically states that the Commission will

^{11/} Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) ("CMRS Second Report and Order"), Erratum, 9 FCC Rcd 2156 (1994).

^{12/} Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd ____ (1994) ("CMRS Second Report and Order").

^{13/} See Third Report and Order, at 5.

^{14/} Footnote omitted. Third Report and Order, at 61.

^{15/} The Commission carved out an exception for transfer or assignment of existing SMR facilities and provided a waiver procedure for new station licenses for permanent facilities, provided that operation of such proposed stations affects coverage solely within a geographic area and on a frequency channel that already is licensed permanently to the applicant(s), i.e., there is no infringement of new spectrum or previously uncovered geographical areas. See Third Report and Order at 61.

"continue to accept new SMR applications for General Category channels."^{16/}

II. THE FREEZE OF 800MHz APPLICATIONS IS A SUBSTANTIVE RULE

The suspension of acceptance of applications in any given service is not new to the FCC. Traditionally, such a freeze is considered procedural in nature. Whether a particular freeze constitutes a substantive rather than a procedural rule change is material because Section 553 of the APA requires that a general notice of rule making be published in the Federal Register, that interested persons shall be given an opportunity to participate in the rule making, and that the final rule be published, incorporating a concise statement of its basis and purpose, thirty days before its effective date. Any rule which is deemed to be procedural in nature is exempted from the notice and comment requirement of Section 553.

In Kessler v. F.C.C. 326 F.2d 673 (D.C. Cir. 1963), the Commission announced a freeze on acceptance of AM broadcast applications by a Report and Order released on the day the freeze became effective. There the Commission argued that the freeze was necessary so that the Commission might reexamine the standards employed in assigning new or changed standard broadcasting facilities. The Commission envisioned that the new rules would be "virtually unchanged from"^{17/} the rules in place at

^{16/} See Third Report and Order, at 61. Cf. Exhibit 2, p. 3.

^{17/} 326 F. 2d 678.

the time of the freeze. In determining that the freeze was merely a "temporary halt on the filing of new applications pending the consideration, and possible promulgation, of new rules following notice and a public hearing,"^{18/} the Court looked to the Commission's Order on reconsideration of the freeze. In that Order, the Commission stated:

Substantive rules are those which change standards of station assignments and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business. ... The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential purpose of the rule. ... Since the interim criteria created no new station assignment standards but were, rather, primarily concerned with the effective functioning of Commission processes, the AM 'freeze' was procedural in nature and not subject to the formal rule making requirements of the Administrative Procedure Act.^{19/}

In considering the Commission's criteria with relation to the instant freeze, and the context within which the freeze is promulgated, the essential purpose, to forever bar CCI and others similarly situated from applying for the facilities proposed in its application, becomes clear. Considered in the context in which it was adopted, the rule materially changes the standards of station assignments to licensing on a market-by-market basis. Because CCI's proposal links two markets, the freeze forever prevents consideration of CCI's Mid-South ESMR proposal. Because

^{18/} 326 F.2d 681.

^{19/} 326 F. 2d 680-681. Emphasis in original.

the rule destroys existing station assignment standards by returning the application proposing the specific two market distribution corridor plan, the rule is substantive, and so subject to the notice and comment requirements of Section 553(b) of the APA. For this reason, CCI is in a materially different position from Kessler.

Similarly, CCI's position is materially different from that of the Appellant in Neighborhood TV Company, Inc. v. F.C.C., 742 F.2d 629 (D.C. Cir. 1984). In Neighborhood TV, the Commission issued a Memorandum Opinion and Order which imposed a freeze on future filing of television translator applications while it adopted final regulations governing low power television. The changes in the Commission's rules with respect to television translator applications subjected the Appellant to competition for the facilities it sought. In determining that the freeze in Neighborhood TV was procedural, the Court noted that the applicant's ultimate interest in the FCC proceedings was in the grant of the licenses. It determined that the freeze and processing reorder decisions affected this interest only incidentally, first by delaying consideration of the applications and second by subjecting the applications to increased competition with qualified applicants.^{20/} The Court found it significant that the freeze and the context in which it was implemented did not limit or preclude the Appellant from

^{20/} 742 F.2d 637.

competing for the translator licenses along with other qualified applicants.

Clearly, the implementation of the freeze which resulted in the return of CCI's application, in the context in which it was implemented, limits and precludes consideration of CCI's application. The return of CCI's application effectively bars it from ever applying for the distribution corridor facilities specified. Once again, the Court in Neighborhood TV noted that the interim criteria therein imposed created no new station assignment criteria. The Neighborhood TV freeze was procedural. Because the current freeze effectively is a permanent bar to CCI's distribution corridor application, implementation of the freeze is a substantive rule.

In Neighborhood TV, in considering whether the freeze was substantive or procedural, the Court considered the decision in Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980). In discussing the difficulty in making such an assessment, the court in Batterton observed:

A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.

648 F.2d 707. The Court in Batterton noted that substantive rules grant rights, impose obligations, or produce other significant effects on private interests. Procedural rules merely express an agency's interpretation, policy or internal

practice or procedure. Procedural rules are not determinative of issues or rights addressed. Procedural rules "do not ... foreclose alternate courses of action or conclusively affect rights of private parties."^{21/} In the end, the Court found that because of other changes in the regulatory scheme, the internal methodology implemented privately by the agency, which had long been merely procedural, was transformed into the critical factor. The selection of that methodology was, therefore, a substantive rule, subject to notice and comment.

Batterton is especially relevant to CCI's situation because, as noted, other changes in the regulatory scheme by which CCI's SMR operations are governed transform the freeze, the likes of which have traditionally been considered procedural, into a substantive action necessitating notice and comment. Specifically, in the Third Report and Order, the Commission not only revises its allocation scheme for 800 MHz facilities, making CCI's proposal unacceptable after the effective date of the rules, but it also completely eradicates the system by which applications have been granted in the 800 MHz SMR service. In its place, the Commission proposes to implement competitive bidding procedures for selecting among mutually exclusive applications, awarding the to the applicant who places the highest value on the available spectrum for each specific market.^{22/}

^{21/} 648 F.2d 702.

^{22/} See CMRS Third Report and Order, at 153.

This complete change in the licensing procedures for 800MHz facilities causes the freeze to affect CCI in a second and related substantive way. The freeze, which by its terms remains in effect until the CMRS rules are in effect, effectively transforms CCI from an applicant for enhanced facilities into a bidder at auction for facilities which are distinct from those specified in its application and which overlay facilities for which its participating licensees are already licensed.^{23/} CCI will now have to pay enormous sums for rights it previously acquired at nominal cost.

The interaction between the freeze and the regulatory context in which it was implemented affects CCI's application so dramatically that the freeze itself has become a substantive action. The essential purpose of the freeze is to serve as an effective bar to CCI's application, so that it may never be filed.

Because of the context in which the current freeze was implemented, in effect, it bars CCI's application forever. This permanent bar alters the rights and interests of applicants who forever lose proposals developed prior to the freeze and filed with the Commission in good faith. For CCI the freeze is nothing short of a denial of its application. The freeze forecloses any course of action which would result in grant of CCI's application

^{23/} Additionally, considering the inflated prices which have been pledged for FCC licensed facilities to date, CCI could be in a position where it is precluded from participating because of the amount of money required to participate in the auctions.

as submitted and so conclusively affects CCI's right to have its application considered on the merits of the system proposed therein.

Clearly because of the devastating effect on the applicants whose applications are returned, the freeze is a substantive rule which can only be implemented through notice and comment procedures set forth in Section 553(b) of the APA.

CCI notes that the Commission's return of its Mid-South ESMR application denied it due process of law as guaranteed by the Fourteenth Amendment to the Constitution. CCI enjoyed a vested interest legitimately entitling it to issuance of the license for its Mid-South ESMR system under the rules and policies in effect at the time it filed its application. See Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 LED2 548 (1972). The intervention of the freeze has denied CCI due process.

The Fourteenth Amendment's procedural protection of property is a safeguard of security interests that a person has already acquired in specific benefits. Such interests -- property interests -- may take many forms. To have a property interest in a benefit, an entity clearly must have more than an abstract need or desire for it. It must have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to notice and a hearing to provide an opportunity to preserve those claims.

The court in Roth noted that while property interests are not created by the Constitution, property rights are created and their dimensions are defined by existing rules or understandings that stem from an independent source. Thus, welfare beneficiaries who had not yet shown eligibility had a right to a hearing so that they might demonstrate such eligibility.

Just as welfare recipients' "property" interest in welfare was created and defined by statutory terms, CCI's property interest in the Mid-South ESMR system has been created and defined by the Commission's rules and policies. Section 90.143 of the Commission's rules, 47 C.F.R. 90.143 specifies that

the Commission will grant an application for a station authorization without a hearing if it is in proper form, and conforms with all rule requirements, and would serve the public interest, convenience or necessity.

In practice, this has meant that if an application is filed in conformity with the rules, it will be granted.

With respect to applications to serve wide-areas with enhanced equipment, like CCI's Mid-South ESMR application, the Commission has set forth the requirements for grant specifically. On December 23, 1992, Ralph A. Haller, then Chief of the Private Radio Bureau, sent a letter to David E. Weisman, Esq. outlining these requirements. Initially, the applications must propose systems to serve wait listed areas, where the frequencies of the SMR stations are used so extensively by the applicant that the frequencies could not be used by any other applicant to develop a viable system, or any other area where no additional 800MHz

channels are available. Further, a single wide area SMR system should be defined by the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by an applicant. Applicants must demonstrate sufficient loading to satisfy the so-called 40-mile rule, allowing the applicant to hold multiple SMR stations spaced less than 40 miles apart, consistent with Section 90.621(a) (1) (iv).

Essentially, an ESMR applicant must show that no 800MHz channels are available in the proposed area; that all stations in the ESMR system are contiguous and not more than 70 miles distant from one another; and, finally, that it has sufficient loading to allow assignment of the system consistent with 90.621(1) (iv).

CCI's application proposes services in a wait listed area. The stations are closely spaced and CCI certified sufficient loading to allow the grant. CCI was entitled to have its application considered and granted if it conformed to the rules. Return of that application violated CCI's due process rights. The application must be reinstated and processed forthwith.

III. THE FREEZE CANNOT BECOME EFFECTIVE UNTIL THIRTY (30) DAYS AFTER PUBLICATION

Despite the Commission's authority to designate an effective date which is earlier in time than the public notice of an action,^{24/} clearly, if the Commission enacts a substantive rule,

^{24/} See Section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a).

Sections 552(a)(1) and 553(d) of the APA command publication. However, even if the Commission determines that the freeze is a rule of agency procedure, the Court of Appeals for the D.C. Circuit has noted that final publication or service as prescribed by Section 552(a)(1) of the APA is still required,^{25/} and that the rule so published may not become effective until thirty (30) days after publication.^{26/} Because the freeze is an agency statement designed to prescribe law, policy or procedure in relation to the acceptance of applications for 800 MHz SMR facilities, it is a "rule" within the meaning of Section 551(4) of the APA.^{27/} Section 552(a)(1) of the APA provides that each agency shall separately state and currently publish in the Federal Register

^{25/} See Batterton v. Marshall, 648 F.2d 701.

^{26/} Even if the Commission could argue that its News Release of August 9, 1994, was somehow sufficient public notice, under 553(d) it still could not immediately implement the freeze. The News Release cannot remedy the deficiency in publication because it is well settled that an FCC News Release does not carry any legal force or effect. See MCI v. F.C.C., 515 F.2d 385 (D.C. Cir. 1974). Moreover, because the Commission failed to state in either the News Release or the Third Report and Order that it found good cause to implement the freeze prior to the expiration of the thirty (30) day notice period, and so bring the effective date under the exemption of Section 553(d)(3) of the APA, the publication period must be observed.

^{27/} Section 551(4) of the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

for the guidance of the public the promulgation of such rules.^{28/}
Section 553(d) of the APA prescribes that the required
publication or service of a substantive rule shall be made not
less than thirty (30) days before the proposed effective date.^{29/}
In determining that promulgation of a procedural rule is subject

^{28/} Specifically, Section 552(a)(1) provides that these items
shall be published in the Federal Register:

(A) descriptions of its central and field organization
and the established places at which, the employees (and
in the case of a uniformed service, the members) from
whom, and the *methods whereby*, the public may obtain
information, make submittals or requests, or obtain
decisions;

(B) statements of the general course and method by
which its functions are channeled and determined,
including the nature and requirements of all formal and
informal procedures available;

(C) rules of procedure, descriptions of forms
available or the places at which forms may be obtained,
and instructions as to the scope and contents of all
papers, reports, or examinations;

(D) substantive rules of general applicability adopted as
authorized by law, and statements of general policy or
interpretations of general applicability formulated and
adopted by the agency; and

(E) each amendment, revision, or repeal of the
foregoing.

See 5 U.S.C. § 552(a)(1). Emphasis added.

^{29/} This provision excepts (1) a substantive rule which
grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or (3) as
otherwise provided by the agency *for good cause found and
published with the rule*. See 5 U.S.C. 553(d). Emphasis added.
Section 553(d)(3) is explicit. If the Commission did find good
cause for early implementation, it must publish that good cause
with promulgation of the rule. The Commission did not do so.
There was no good cause found. See Third Report and Order,
Paragraphs 108, 415.

to the publication requirements, the U.S. Court of Appeals for the Fourth Circuit considered whether a procedural rule "so directly affect[ed] pre-existing legal rights or obligations, indeed that [the rule] is of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence."^{30/}

Clearly, at a minimum, the courts in Batterton and Appalachian Power Co. would require § 552(a)(1) publication of the freeze. Not only would such publication satisfy the APA, it would also have the desirable effect of providing notice to those directly affected by the new rules.

IV. THE COMMISSION PROPOSES THE FREEZE IS EFFECTIVE UPON ADOPTION OF THE THIRD REPORT AND ORDER

Paragraph 108 of the Third Report and Order specifies that the Commission will "suspend the acceptance of 800 MHz applications on the 280 SMR category channels on the close of business on August 9, 1994, the date of adoption of this Order."^{31/} It is clear, however, that the Order was not truly adopted on August 9, 1994. Initially, the News Release, purportedly issued on August 9, 1994, proposed to suspend "acceptance of new 800 MHz SMR applications (*including SMR applications for General Category channels*)."^{32/} This is clearly

^{30/} See Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977). Citations omitted.

^{31/} Emphasis added.

^{32/} See News Release, Exhibit __ hereto, at 3. Emphasis added.

what FCC adopted on August 9. As further evidence of the Commission's position on the freeze on August 18, 1994, Ralph A. Haller, then Chief of the Private Radio Bureau, wrote a letter to each of the official coordinators of General Category frequencies.^{33/} In that letter, Mr. Haller advised these coordinators that the Commission had suspended acceptance of new 800 MHz SMR applications (*including SMR applications for General Category channels*), as of August 9, 1994, and that any applications received after August 9, 1994 by each of these coordinators should be returned to the applicant.^{34/} The Third Report and Order, allegedly adopted the same day that the News Release was issued clearly contains an absolutely contradictory statement with regard to General Category channels. Specifically, paragraph 108 states: "*We will also continue to accept new SMR applications for the General Category channels.*"^{35/} Apparently, with respect to the freeze issue, the Third Report and Order was still subject to material revision as late as August 18, 1994 as Haller's letter proves. The first indication of a change from the August 9 Order came when Commissioner James H. Quello transmitted a memorandum on September 20, 1994, indicating his strong dissent with the position eventually published in the Third Report and Order.^{36/} It is clear that

^{33/} See Exhibit 7.

^{34/} See Exhibit 7, at 1.

^{35/} See Paragraph 108. Emphasis added.

^{36/} See Exhibit 8.

sometime between August 18 and September 20 the Commission voted to adopt the freeze position of the Order if not the entire Order.

Clearly, the Commission could not have promulgated the freeze on August 9, 1994, because a material provision of the freeze, the waiver, had not yet been formulated.^{37/} The freeze carves out a waiver for permanent facilities provided that operation of such "proposed stations affects coverage solely within a geographic area and no infringement of new spectrum or previously uncovered geographical areas."^{38/} Because the FCC did not fully develop its freeze policy until after the date it claims to have adopted it, CCI's application, filed on August 10, 1994, must be reinstated and processed.

V. THE MAILBOX RULE ALLOWS ACCEPTANCE OF CCI'S APPLICATION.

Even if the Commission determines that the freeze is properly in place on August 9, 1994, CCI's application was filed within twenty four hours of that implementation. Under the mailbox rule, set forth in Filing of Time Critical, Feeable

^{37/} CCI might have been able to justify grant of a waiver if it had had proper notice of the freeze and its waiver provision. CCI did not have the opportunity to consider this option because the Commission failed to provide proper notice. The inclusion of the waiver is a further substantive action which materially affects the rights of persons appearing before the Commission.

^{38/} This waiver provision is an additional material change to the freeze which was not in place on August 9, 1994. Clearly, the Commission is free to adopt an item, leaving editorial discretion to its staff and delegated authority.

Applications^{39/}, the Commission will accept as timely filed, those applications stamped in by the lockbox bank before 12 o'clock midnight on the next business day following the official deadline or cut-off date established by the Commission. The mailbox rule considered, CCI's application was timely.

Clearly the Commission's actions in implementing the 800MHz freeze in the current regulatory environment without notice and comment was improper. In fact, its failure to give CCI proper notice of its intention to so freeze acceptance of applications, including the Mid-South ESMR application violated CCI's due process rights. To remedy this violation, the Commission must immediately reinstate CCI's application and process it to grant.

Even if the Commission determines that the freeze was merely procedural in nature, it was still bound to publish the freeze at least thirty days before implementation, in accordance with Section 552(a)(1) of the APA. It did not.

Moreover, the Commission proposes that the freeze go into effect on the date of adoption of the Third Report and Order. The date on which the Third Report and Order was finalized and adopted is unclear. Specifically, the Commission has circulated documents which tend to show that material provisions of the freeze were not settled until long after August 9, 1994.

These premises considered, CCI respectfully requests that the Commission reconsider its action in returning its Mid-South

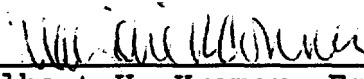
^{39/} 67 Rad. Reg. (P&F) 1127 (1990).

ESMR application, reinstate it as if filed on August 10, 1994,
and process it through to grant.

Respectfully submitted,

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